

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUGLAS WILKINSON

Claimant

VS.

HUTCHINSON CORRECTIONAL FACILITY

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Carrier

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Docket No. 184,289

ORDER

ON the 15th day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Order and Nunc Pro Tunc Order entered by Administrative Law Judge George R. Robertson dated February 3, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Robert A. Anderson, of Ellinwood, Kansas. The respondent and self-insured appeared by and through its attorney, Thomas D. Arnhold, of Hutchinson, Kansas. There were no other appearances.

RECORD

The record consists of the documents filed of record with the Division of Workers Compensation in this docketed matter including the transcript of preliminary hearing heard before Administrative Law Judge George R. Robertson on February 3, 1994, and the exhibits attached thereto.

ISSUES

(1) Whether the claimant met with a compensable occupational disease arising out of and in the course of his employment with the Hutchinson Correctional Facility.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board makes the following findings of facts and conclusions of law:

(1) Claimant has failed in his burden of proving an occupational disease arising out of and in the course of his employment with the Hutchinson Correctional Facility.

Claimant became employed with the Kansas Department of Corrections at the Hutchinson Correctional Facility on January 11, 1993. The correctional facility and the Kansas Department of Corrections require periodic tuberculosis tests be performed on all employees. Claimant's initial screening at the time of hire was negative, with a follow-up screening in April or May of 1993, also negative.

On July 12, 1993, claimant underwent an additional screening at which time claimant tested positive for tuberculosis. Claimant was diagnosed as having positive tuberculosis but did not have an active case of tuberculosis.

Tests performed at the Hutchinson Correctional Facility failed to uncover any active positive cases of tuberculosis among either the employees or the inmates. Evidence provided by the respondent indicates tuberculosis, in order to be contagious, must be active positive. With no evidence of a active positive case of tuberculosis at the Hutchinson Correctional Facility, there is no evidence to tie claimant's positive test results to his employment.

The medical records of Mark Wencel, M.D., admitted into evidence as Claimant's Exhibit No. 1 indicate the claimant's mother, while not involved in an active case of tuberculosis, has had a positive skin test in the past.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The evidence presented also indicates that there are four active positive cases of tuberculosis in all of Reno County. None of these active positive cases is connected to the Hutchinson Correctional Facility.

The claimant asks the Appeals Board to speculate that, while there are 1200 inmates in the Hutchinson Correctional Facility at any given time, any or all could be active positive and the staff would never know. The law does not require the respondent to disprove the claimant's allegations but rather that the claimant prove his contentions in order to be eligible for benefits under the Kansas Workers Compensation Act.

K.S.A. 44-5a01(b) defines occupational disease as meaning:

"... only a disease arising out of and in the course of employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged."

Speculation regarding where the claimant may or may not have contacted tuberculosis is not sufficient to overcome the statutory requirement that the claimant prove by a preponderance of the credible evidence that his contentions are more probably true than not true. The claimant requests the Appeals Board base its decision upon speculation and conjecture rather than evidence, which the Appeals Board is unwilling to do.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Nunc Pro Tunc Order of Administrative Law Judge George R. Robertson of February 3, 1994, is reversed and that the claimant, Douglas Wilkinson, shall be and is denied an award against the respondent, Hutchinson Correctional Facility and the Kansas State Self-Insurance Fund, as claimant has failed in his burden of proving an occupational disease arising out of and in the course of his employment with the respondent, and thus, is not entitled to benefits under the Kansas Workers Compensation Act.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert A. Anderson, PO Box 398, Ellinwood, Kansas 67526
Thomas D. Arnhold, PO Box 1362, Hutchinson, Kansas 67504-1362
George R. Robertson, Administrative Law Judge
George Gomez, Director